

STATE OF VERMONT
PUBLIC SERVICE BOARD

Investigation into: (1) whether Entergy Nuclear Vermont)
Yankee, LLC, and Entergy Nuclear Operations, Inc.)
(collectively, "Entergy VY"), should be required to cease)
operations at the Vermont Yankee Nuclear Power Station,)
or take other ameliorative actions, pending completion of)
repairs to stop releases of radionuclides, radioactive)
materials, and, potentially, other non-radioactive materials) Docket No. 7600
into the environment; (2) whether good cause exists to)
modify or revoke the 30 V.S.A. § 231 Certificate of Public)
Good issued to Entergy VY; and (3) whether any penalties)
should be imposed on Entergy VY for any identified)
violations of Vermont statutes or Board orders related to)
the releases)

**CONSERVATION LAW FOUNDATION'S REPLY BRIEF REGARDING PUBLIC
SERVICE BOARD JURISDICTION**

I. Public Service Board has the Authority and Obligation to Take Action in Response to the Leaks.

For over nine months Vermonters have known that leaks at the Vermont Yankee facility are contaminating Vermont's soil, groundwater and surface water. This contamination is continuing. The circumstances that led to the leaks in the first place and Entergy VY's failure to take the reasonable action needed to avoid the contamination remain unabated. In the face of these ongoing problems, it is the Vermont Public Service Board's obligation to take action.

A. PSB Oversight Responsibility

The Vermont Public Service Board (Board or PSB) has regulatory oversight responsibilities for the public utilities and generation facilities that operate in Vermont. 30

V.S.A. § 203. It is pursuant to PSB authority that Vermont Yankee has a license to operate in Vermont. 30 V.S.A. §§ 203, 231, 248(e). If Entergy VY does not comply with its license to operate, the Board has the authority and obligation to take action to address those shortcomings. 30 V.S.A. § 231(a); *Investigation into General Order No. 45*, Docket 6545, Order of 6/13/02 at 80. The Board's authority is similar to the authority to revoke or suspend a driver's license. If a driver is speeding or driving drunk, the driver's license can be revoked or suspended. 23 V.S.A. § 671 et seq. The driver is not complying with the terms of his or her license to operate. The same standard must apply to the operation of a nuclear generation facility in Vermont. If Entergy VY, the holder of the license and operator of the facility, is not complying with the terms of its license, the Board has the authority and obligation to suspend or revoke Entergy VY's license. 30 V.S.A. §§ 203, 231, 248(e).

B. NRC Authority does not Preempt Board Action.

United States Supreme Court precedent is clear that Vermont has authority to take action in response to the leaks. In *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) the United States Supreme Court upheld the authority of California to prohibit construction of nuclear power plants prior to a state determination of adequate means for the disposal of nuclear waste. *Id.* at 216. The Court determined that California's actions were not preempted by the Atomic Energy Act (AEA). *Id.* In every case since *PG&E* where the U.S. Supreme Court has considered federal preemption under the AEA, the Court has held that the AEA does not present a bar to state law claims. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990). Just as California can prohibit construction if there is no adequate means to dispose of waste, Vermont can suspend or revoke Entergy VY's

license to operate because leaks at the facility harm Vermont's environment, economy and land use.

C. Entergy VY's Claims would Defeat any Board Action

To avoid responsibility for the leaks, Entergy VY offers extremely broad claims of preemption that would defeat any Board action. Entergy VY claims that the Board is precluded from taking action because "the specific relief sought ... would have a direct and substantial impact on the construction and operation of the VY Station, particularly with respect to radiological safety." Entergy VY Supplemental Brief at 12 (8/27/10). By Entergy VY's analysis, any action by the Board would be precluded. It is hard to imagine any Board action regarding either Entergy VY or the Vermont Yankee facility that would not have a "direct and substantial impact on the ... operation of the VY Station." That is the very purpose of regulatory oversight and the basis for regulatory responsibility. 30 V.S.A. §§ 203, 231, 248(e). If the Board cannot take action to redress problems affecting the operation of the facility, the Board's oversight authority is meaningless.

This Board has repeatedly rejected Entergy VY's broad claims of preemption. The Board determined it has the authority to regulate Entergy VY's decommissioning fund independently of FERC and the NRC rules, and made explicit that the terms of Entergy's certificate of public good have the force of law. *Investigation into General Order No. 45*, Docket 6545, Order of 7/11/02 at 11-15. The Board also rejected Entergy VY's broad claims of preemption regarding management of spent nuclear fuel. *Petition of Entergy Nuclear Vermont Yankee*, Docket 7082, Order of 4/26/06 at 64-65. In both those cases the Board appropriately took action that would have a "substantial impact on the ... operation of the VY Station." Contrary to Entergy VY's

claims, the simple fact that Board action will affect the facility's operations does not defeat Board authority.

Entergy VY's claim that authority is defeated simply because Board action could affect radiological safety also is without merit. Entergy VY casts all of Vermont Yankee's operations as affecting radiological health and safety and then claims that any Board action is preempted. Entergy VY Supplemental Brief at 12-15 (8/27/10).

Board action in response to the leaks is no different than the previous Board action regarding decommissioning or spent fuel. *Investigation into General Order No. 45*, Docket 6545, Order of 7/11/02; *Petition of Entergy Nuclear Vermont Yankee*, Docket 7082, Order of 4/26/06. Both decommissioning and management of spent fuel affect radiological health and safety. This alone does not preclude Board authority. In all the cases where state action has been upheld, the mere fact that there was some nexus to or impact on radiological health and safety did not defeat state authority. "... States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *PG&E* 461 U.S. at 205. Tort actions for injuries resulting from radioactive contamination are not preempted. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984). State awards for workers compensation resulting from radiological injuries are not precluded. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988). Awards for intentional infliction of emotional distress stemming from an incident involving radioactive contamination are not precluded. *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990). All these cases and circumstances touch on radiological safety but because they involve matters traditionally regulated by states, the actions are not preempted. Entergy VY's overly broad claims of

preemption simply are unsupported and cannot defeat Board authority to take action in response to the leaks.

II. Board Action is Required to Address Impacts from the Leak

Absent Board action, it is clear that no action will be taken to redress pollution, economic and land use impacts of the leaks. Entergy VY has made no claim that the NRC will address these impacts and there is no history of the NRC addressing state economic, pollution or land use impacts. Entergy VY persists in advancing a shell game of dockets, proceedings and regulatory oversight. Matters raised in one proceeding are deflected as pertaining to a different proceeding or authority. (See e.g. A.CLF:EN.1-26 to 1-30 (refusal to answer discovery requests regarding information about underground piping); A.CLF:EN.1-20 (refusal to answer discovery request regarding costs of cleanup as outside of PSB jurisdiction). This shell game continually fails to address the leaks and contamination that has been ongoing for over two years. The Board cannot accept Entergy VY's attempt to put all matters relating to the leaks into a shell that falls under NRC regulation when doing so means that no action will be taken. The Board has its own obligations and responsibilities set forth by statute. The Board must take action to ensure that the actions of Entergy VY do not violate the law and are not contrary to Entergy VY's license to operate. The Board simply cannot accept that its authority is usurped entirely by a broad claim of preemption. The division of responsibility and authority put forward by Entergy VY results in no responsible oversight or action taken in response to the leaks. A lack of action to protect Vermonters environmental, land use and economic interests is irresponsible.

III. Conclusion

For the forgoing reasons, the Vermont Public Service Board should reject Entergy VY's broad claims of preemption by federal law and grant the relief requested in this proceeding.

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